



July 1, 2016

[Complainants]

[District]

<b>THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION</b>
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RE: **FINAL REPORT for** In the Matter of \*\*\* Case #2016-02, Alleged Violations of the Individuals with Disabilities Education Act (IDEA).

This is the Final Report pertaining to the above-referenced state special education complaint (Complaint) filed pursuant to the Administrative Rules of Montana (ARM) 10.16.3662. \*\*\* (Complainants) filed the Complaint on behalf of their child, \*\*\* (Student), a student in \*\*\* Middle School, \*\* School District (District). Complainants allege the District violated the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. §1400 et seq., Montana special education laws, Title 20, Ch. 7, Montana Code Annotated (MCA), and corresponding regulation at 34 CFR Part 300 and ARM 10.16.3007 et seq.

Complainants allege the District denied Student a free appropriate public education (FAPE) because Student's 2014<sup>1</sup> and 2015<sup>2</sup> IEPs were not reasonably calculated to provide educational benefits.

**A. Procedural History**

1. On January 25, 2016, the Office of Public Instruction (OPI) received the special education complaint signed by the Complainants. The Complaint indicated the Complainants requested mediation and would agree to extend the timeline of the Complaint to engage in mediation.
2. On January 27, 2016, the OPI received written consent from the District that they would like to request mediation and also agree to extend the timeline of the Complaint.
3. The parties held a mediation session on March 22, 2016. The parties did not reach a written agreement during the mediation session but requested more time to gather information and proceed with attempting to resolve the dispute.
4. OPI repeatedly contacted parties through email and telephone calls about a signed agreement. On May 2, 2016 the Complainant's advocate indicated that although resolution has been reached on most issues, at least one issue remained to be investigated.

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<sup>1</sup> The 2014 IEP is dated November 13, 2014 and was signed by the parents on November 24, 2014.

<sup>2</sup> The 2015 IEP is dated November 12, 2015 and was signed by the parents on December 4, 2015.

5. On May 6, 2016 OPI requested the written response to the complaint from the District. The District did not respond to OPI's request for written response within 10 days as required by ARM 10.16.3662(5).
6. On June 16, 2016 OPI received a signed agreement from the parties dismissing all issues in the Complaint except for whether the Student was entitled to compensatory education for being denied FAPE.
7. The Complaint proceeded to investigation. The appointed complaint investigator continued to attempt to contact District counsel. An email communication was sent on May 25, 2016 to the parties that indicated if no response was received by end of business day on May 26, 2016, the investigation would proceed without further information from the District. The District's written response to the Complaint was received on June 1, 2016.
8. An appointed investigator conducted interviews with: the Complainants, Complainants' advocate, the District's special education director, special education teacher, previous special education teacher and owner/operator of a private tutoring center.

## **B. Legal Framework**

The OPI is authorized to address alleged violations of the IDEA and Montana special education laws through this special education state complaint process as outlined in 34 CFR §300.151-153 and ARM 10.16.3662, which occurred within one year prior to the date of the complaint. Pursuant to 34 CFR § 300.151-153 and ARM 10.16.3662, all relevant information is reviewed and an independent determination is made as to whether a violation of federal or state statute, regulation or rule occurred.

## **C. Findings of Fact**

1. Complainants have standing to file this Complaint pursuant to ARM 10.16.3661 and 34 CFR § 300.153.
2. Student was eleven and in the sixth grade at the time the complaint was filed. Student has attended school in the District and received special education services from the District since kindergarten.
3. Student is diagnosed with cognitive disability, speech impairment and attention deficit hyperactive disorder (ADHD).
4. Student qualifies for special education services under specific learning disability in the area of math, reading and written expression. Student is also classified as other health impaired due to ADHD.
5. Student's reading, written expression and math achievement scores are at the first grade level.
6. Student has had frequent ability tests, including one completed by a neuropsychologist in 2010. Student was administered the Weschler Intelligence Scale for Children-IV, indicating no significant discrepancy between verbal and performance measures.

7. Another evaluation was completed in 2013 by the District's school psychologist. The school psychologist also administered the Weschler Intelligence Scale for Children-IV, reporting that Student had difficulty maintaining attention, concentrating and exerting mental control. The recommendations included small group or individualized instruction, and provided a number of ways to address Student's memory, attention and concentration skills.
8. In 2014, Student received another neuropsychological evaluation. The ability testing scores were lower than the results obtained in 2013. The evaluator could not determine processing speed for Student. The recommendation was for intensive instruction since Student's academic skills were beginning first grade or kindergarten level.
9. On March 9, 2015, Student's neuropsychologist wrote a letter stating the opinion that Student could benefit from additional tutoring to help bolster his basic academic skills.
10. Student was evaluated at a private tutoring center in November of 2014. Student's scores on this evaluation indicated Student was functioning in math, reading and written expression at the kindergarten or first grade level. Student was retested in October, 2015 with no progress demonstrated.
11. His teachers report that Student is the hardest worker they have ever seen. It was reported Student always gives more than 100% and is exhausted by the end of the day because he has worked so hard. It was also reported Student loves his vocational classes and does very well at assigned tasks.
12. Student's teachers also report Student's poor memory skills impact significantly on his learning and retention. In order to learn, Student needs to be pre-taught and retaught one or more times until he masters the skill. It was reported that even then, continual repetition is sometimes necessary before a skill becomes ingrained.
13. Although all evaluations and teachers indicate that difficulty with memory, attention and concentration significantly impact Student's learning and ability to retain the information learned, Student's 2014 and 2015 IEPs do not have any goals or list ways Student's skills in memory, concentration or attention are being addressed.
14. Parents also report Student needs extensive repetition of skills at home for him to maintain and integrate new skills.
15. Student has participated in Extended School Year (ESY) services because of regression over long breaks.
16. Student's teachers expressed concern that if Student receives additional tutoring or instruction, he will not be successful, negative behaviors may emerge, or Student will hate school.
17. During the 2015-2016 school year, Student was in a small group of approximately two students with one teacher. The classroom teacher would reteach individually, as needed.
18. Student's classroom teachers reported their belief that Student is working as hard as he can. The teachers have seen progress in specific skills sets in reading, math and written expression, but those skills are not always maintained. The teachers are using a combination functional/academic program for reading, written expression and math. There is a question as to Student's academic potential.
19. Student began a new reading series in the fall of the 2015-2016 year. The District has tried multiple reading series since Student has been in school. Student's goals during the 2015-

2016 school year have been more functionally based, including learning safety and environmental words.

20. The private tutoring center owner stated the center would be able to provide services to Student immediately, and expressed confidence that Student would make progress. The owner explained that a large majority of the students served at the center were on IEPs, and there were children with similar functioning levels as Student served at the center.
21. The owner of the private tutoring center recommended Student receive additional tutoring at the center three times a week for up to two hours, also noting concerns that two hours may be expecting too much from Student after a full day at school. Weekend tutoring was also offered as an option.
22. Student is also receiving weekly private speech-language services outside of the school day.
23. Student's October 30, 2015 progress report indicated five of eight goals on Student's 2014 IEP were met.
24. The Progress Reports from the 2014 and 2015 IEPs and supporting data indicate Student is slowly making progress.

#### **D. Analysis and Conclusions**

**Issue:** Did the District deny Student a free appropriate public education (FAPE) because Student's 2014 and 2015 IEPs were not reasonably calculated to provide educational benefit?

Complainants allege Student's 2014 and 2015 IEPs were not reasonably calculated to provide Student with education benefit as required to provide FAPE. Specifically, Complainants allege Student has remained at a first grade level in math, reading and written expression for the past several years, despite recommendations from evaluators suggesting more individualized instruction. Complainants are requesting a one-on-one aide and extra tutoring from an outside private tutoring center.

FAPE means special education and related services that:

- (a) are provided at public expense, under public supervision and direction, and without charge;
- (b) meet the standards of the state educational agency;
- (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) are provided in conformity with an individualized education program (IEP).

34 CFR §300.17. The proper standard to determine whether a student with a disability has received FAPE, is the "educational benefit" standard. *J.L v. Mercer Island School Dist.*, 592 F.3d 938,951 (9<sup>th</sup> Cir. 2010). The district must confer at least "some educational benefit" on students with disabilities. *Id.* This standard is referred to as "a basic floor opportunity" not a "potentially maximizing education." *Id.* at 947 citing *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 197 (1982).

The District does not have to provide Student with the most potentially maximizing education available. In order to provide FAPE it only has to be shown that some educational benefit was conferred. An IEP cannot be judged exclusively in hindsight, “In striving for ‘appropriateness,’ an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is at the time the IEP was drafted.” *Adams v. State of Oregon*, 195 F.3d 1141, 1149(9<sup>th</sup> Cir. 1999) (*quoting Fuhrmann v. East Hanover Bd. Of Educ.*, 993 F. 2d 1031, 1041 (3<sup>rd</sup> Cir. 1993)(citations omitted)).

### **Inadequate Supports and Services**

Complainants allege Student needs more intensive instruction and the District has provided inadequate supports and services in the IEP. The school psychologist and Student’s neuropsychologist both emphasized Student would benefit from intensive instruction in small groups. The school psychologist, in his 2013 report, listed a number of recommendations for working with Student, specifically listing strategies and skills that would help with memory. In a letter dated March 9, 2015, Student’s neuropsychologist indicated Student could benefit from additional tutoring to bolster basic academic skills. Via email on May 27, 2015, the Complainants requested the District pay for additional tutoring. The Complainant’s request was denied. After evaluating Student, the owner/operator at the private tutoring center believes that the center’s staff would be able to make progress with Student. However, there is a concern about how much more work Student would be able to do in a school day. His teachers were concerned he may become burnt out and dislike school. Student is typically exhausted at the end of his school day.

Complainants have also requested more one-on-one instruction for the 2015-2016 school year.<sup>3</sup> With regard to the previous 2014-2015 school year, the Complaint states: “[t]here is documentation to indicate [Student] did progress from the more intensive (7:4 student/staff ratio) instruction...”<sup>4</sup> During the 2015-2016 school year Student was in a small group of approximately two students with one teacher. All of the evaluations reviewed for Student indicate that memory, concentration and attention are a weakness and can impact his learning. The progress notes indicate the teachers were using some of the recommendations of the school psychologist and neuropsychologist evaluations. Student’s teachers say he is an extremely hard worker but is limited by memory weaknesses.

The amount and type of services a student needs is individualized. 34 CFR § 300.320. In developing the IEP, the team must take into consideration the concerns of the parents for enhancing the education of their child. 34 CFR 300.324(a)(1)(ii). A student’s IEP is not defective if the District does not provide specific services or supports at parent request, if the services are not necessary to provide student FAPE. Similarly, if a parent obtains a private evaluation, the results of the evaluation must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. 34 CFR

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<sup>3</sup> The District did provide an additional paraprofessional to Student’s classroom for the past month of the school year, after the time of this Complaint. Student will receive one-on-one instruction in academic subjects.

<sup>4</sup> It is noted the 2015 math PLAAFF referred to in the Complaint is inaccurate. The PLAAFF listed is actually from 2013.

300.502(c)(1). Likewise, “a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency.” *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 640-641 (7th Cir. 2010). So, although input and recommendations by parents, private evaluations, physicians, psychologists or other evaluators must be considered they do not need to be adopted unless considered necessary for FAPE by the IEP team.

### **Lack of Progress**

Complainants allege student has had a lack of academic progress. There has been some question about Student’s ability. Three intellectual ability tests have been completed, in 2010, 2013 and 2014. All assessments used the Weschler Intelligence Scale for Children-IV. The results from the 2010 and 2014 assessments differ on the determination of Student’s abilities. All assessments agree, however, that Student’s memory skills are quite low (60, 54 and 59). All evaluations also found that attention and concentration were weak areas for Student. Memory has a significant impact on a student’s ability to remember and retain information learned, as do attention and concentration.

A review of the documentation submitted by the District, which included progress reports for the time period of the Complaint<sup>5</sup> and supporting data, demonstrates that Student has made progress. Student has met several of the goals on his IEPs. Particularly, on Student’s October 30, 2015 progress report, it is indicated that five of eight goals on Student’s 2014 IEP were met. The Progress Reports from the 2014 and 2015 IEPs and supporting data indicate Student is slowly making progress.

Student’s academic levels are significantly below his general education peers. Student progresses slowly and has problems with retention and regression. The District is not obligated to provide Student the most maximizing education possible. The progress reports and documentation provided by the District demonstrate that **Student has received educational benefit and the District has provided Student FAPE, therefore the District is not in violation of 34 CFR §300.17.**

### **Procedural note:**

Pursuant to 34 CFR § 300.320(a)(4), the IEP shall include a statement of the special education and related services, supplementary aides and services, and a statement of the program modifications or supports for school personnel that will be provided to enable a Student to: (1) advance appropriately toward attaining the annual goals; (2) to be involved in and make progress in the general educational curriculum and to participate in extracurricular and other nonacademic activities; and (3) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

Student’s 2014 and 2015 IEPs do not have any goals or list ways that Student’s skills in memory, concentration or attention are being addressed. The progress notes from Student’s teacher

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<sup>5</sup> The timeframe of this Complaint is from January 25, 2015 to January 25, 2016.

indicate that some of the suggestions provided by the school psychologist are being used but not in a systematic way. The Student will be evaluated this fall which may provide guidance as to what methodology, services and supports are needed for Student and Student's ability level. Based on the assessments that have been previously completed, Student does have low cognitive ability and his memory impacts on his ability to recall and retain material learned.

The assessments in the fall should consider whether other services may assist Student. Also, careful monitoring of his progress will demonstrate areas where his memory deficits have the most impact and what supports and services are beneficial in assisting Student. It is recommended that the IEP team document those services in the IEP as required by 34 CFR § 300.320(a)(4) so that all employees working with Student are using the same services and keeping the same documentation.

#### **E. Disposition**

For the above reasons the allegations are DENIED.

However, pursuant to the supervisory powers of this Office, the District is ORDERED to review and comply with the procedural requirements of 34 CFR § 300.320(a)(4) as stated above. Please submit a copy of Student's IEP for the next school year after Student's reevaluation, **but no later than January 15, 2017.**

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Ann Gilkey, Chief Legal Counsel

c: Mandi Gibbs, Dispute Resolution/EAP Director  
Frank Podobnik, State Special Education Director  
Dale Kimmet, School Improvement/Compliance Unit Manager  
[District's attorney]